An Arbitrator's Perspective on Construction Arbitration

by

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I. Each arbitrator is different, but

No two arbitrators view construction arbitration exactly the same way. Therefore, it is important to ask what the arbitrator wants and does not want in a presentation. Arbitrators are about getting to the truth in the most economical manner possible, both to save money for the parties, and to allow the proceeding to move forward quickly; good arbitrators are busy and have other matters deserving their attention. They tend not to waste time and expect others to respond accordingly.

Having said that, good arbitrators tend to view the same evidence in generally the same way. Differences of opinion amongst a panel of three neutral arbitrators generally tend to be minor. While construction arbitrators may have different approaches in how they want the evidence presented, they usually interpret the evidence in a similar way.

II. Find out what are the rules of the game

Construction arbitrators work hard to keep everyone on a level playing field. But the parties and their counsel should ask about the rules and the earlier, the better. For example, will hearsay be allowed and if so, how much? Will the arbitrator want pre hearing briefs, and if so, how long and on what specific issues?

III. Discovery disputes

Discovery disputes may win you points with a judge but seldom if ever do they curry favor with a construction arbitrator. Construction arbitrators are not interested in procedure. Their interest lies in getting the parties to the hearing as soon as reasonably possible. If procedure is your game, avoid arbitration. Neither the rules of arbitration nor an arbitrator's general disposition engender enthusiasm or even support for engaging in procedural battles. After all, arbitration is based on consent and agreement, and procedural disputes, by contrast, are rooted in discord and disagreement.

IV. Marshalling the evidence

Prepare your evidence in a manner that allows the arbitrator to understand and follow easily and quickly. Often this means arranging exhibits in chronologic order. Hiding the evidence and employing surprise are not useful tactics. This does not mean, however, that there should be extensive discovery to avoid surprise. It does mean that lawyers and their clients need to be flexible during the hearing and able to think on their feet. Many witnesses will be presenting testimony that is being heard for the first time by at least one of the parties.

V. The hearing

Style still counts in life and in a dead heat it may matter in the outcome of an arbitration proceeding as well. But for all matters that are not a dead heat, substance wins over style. Construction arbitrators are experienced in the industry and in the ways of the world. Truth and merit impress them. Not flair and drama.

What works for a jury may not work for a construction arbitrator, particularly an arbitrator who is not an attorney. Know your arbitrator and tailor your proof accordingly.

This in no way means you need to be boring. Arbitrators do not like boring, any more than you do. It means you need to get to the meat of the matter very quickly. Remember, the construction arbitrator already knows the industry and the general background. Take advantage of his or her knowledge to show why your case fits within industry standards or is deserving of other consideration. Arbitrators like to hear from the witnesses.

VI. Should I ask for specific findings

This is a frequent question. The answer is generally no—unless your dispute involves novel issues of fact or law, or a specific finding would be helpful in future cases to provide guidance on how a party should conduct business going forward. In addition, while everyone wants a finding that the other side was untruthful, such a finding is less likely in arbitration. Construction arbitrators tend to be cautious about issuing sharply worded awards. They understand that the parties are still part of a larger construction industry and the parties may do business together again in the future.

VII. I lost, now what should I do

Remember, arbitration is a process for early and final resolution. No one likes to lose. Attorneys should prepare their clients early that they may lose and in arbitration, there is no meaningful appeal or recourse. That is both the beauty and the beast of arbitration.

VIII. The construction community is small, very small

Stake out a credible position. While arbitration allows a more discreet forum for dispute resolution than an open court of law, the construction industry tends to hear anyway what happened. While the arbitrators will not be talking, others probably will be. The construction industry is close. When necessary, fight, but when not necessary, there is no disgrace in compromise and settlement.

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